

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PHYLLIS L. SMITH)	
Claimant)	
VS.)	
)	Docket No. 1,020,549
ANDOVER HEALTH CARE CENTER)	
Respondent)	
AND)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the April 18, 2006, Award entered by Administrative Law Judge John D. Clark. The Workers Compensation Board heard oral argument on July 18, 2006.

APPEARANCES

Dennis L. Phelps of Wichita, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges she injured her back on December 12, 2003, while working for respondent. In the April 18, 2006, Award, Judge Clark found claimant's accident was compensable and he awarded claimant benefits for a five percent whole person functional impairment.

Respondent and its insurance carrier contend claimant failed to prove she injured her back on December 12, 2003, working for respondent. They further contend claimant did not prove she provided respondent with timely notice of her accident. Consequently, respondent and its insurance carrier request the Board to reverse the April 18, 2006, Award, and deny claimant's request for workers compensation benefits.

Conversely, claimant contends the Award should be affirmed. Claimant argues she injured her back on December 12, 2003, lifting patients at respondent's care center and that she notified her hall supervisor of her accident that day.

The issues before the Board on this appeal are:

1. Did claimant injure her back working for respondent?
2. If so, did claimant provide respondent with timely notice of her accident?

The parties do not challenge that claimant has a five percent whole person functional impairment in the event this claim is compensable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be affirmed.

Claimant worked as a certified nurses' aide in respondent's nursing home and assisted living facility in Andover, Kansas. Claimant worked with residents who required total assistance. Consequently, claimant dressed residents, fed residents, and lifted them in and out of bed.

While working for respondent, claimant also worked part-time for another employer. In that job, claimant performed housekeeping home care services such as washing dishes and doing laundry. That job required claimant to perform minimal direct personal care and, therefore, she did not do the heavy lifting that she did for respondent.

Before going to work for respondent, claimant performed clerical and light factory work. She also worked as a cashier. In short, the work claimant performed for respondent was more physically strenuous than her past jobs.

On December 12, 2003, claimant began experiencing low back pain after lifting residents. She described that shift as follows:

Q. (Mr. Phelps) What happened on December 12, 2003 that resulted in you being injured at Andover Health Care [respondent]?

A. (Claimant) I remember -- like when you first come in, you stock up supplies, like passed out diapers and blankets and bed padding, and you had to get people up for dinner, and that consisted of -- you might have to change their diaper, get them dressed, get them in the wheelchair and roll them down to the cafeteria or dining room. And I probably had about ten to twelve people to get up, and the lifting just finally broke my back down and I started having lower back pains.

Q. And about what time did you first experience those lower back pains from the lifting you did that day?

A. I would say when I had to sit down to assist in the feeding, which probably would have been about five o'clock.¹

Claimant, who had only worked for respondent for about a month, did not know the name of the nurse who was supervising claimant's hallway that shift. Claimant, however, reported her low back pain to her supervisor and was offered some pain pills. Claimant completed her shift that Friday and even worked the next two days before having Monday off. But when it was time to return to work on Tuesday, claimant did not feel she could perform her regular work because of her ongoing back pain. Therefore, claimant asked if there was any clerical or light duty work she could do. Consequently, December 14, 2003, was the last day claimant worked for respondent.

Claimant's back pain persisted. And on December 29, 2003, claimant sought medical treatment at an emergency room. Claimant reported to the emergency room she was a CNA and that she had hurt her back on December 12, 2003, while lifting. In January 2004, claimant sought medical treatment from her family physician, Dr. Linus C. Ohaebosim. Later, in March 2004, claimant sought chiropractic treatment from Dr. Kevin Darden. And finally, in December 2004, claimant saw Dr. Michael H. Munhall for her low back symptoms.

After learning respondent did not have any light duty position for her, claimant eventually applied for and began receiving unemployment benefits. But at the time of her December 2005 regular hearing, claimant was working for Staffmark at the Love Box Company, where she was performing light factory work. Consequently, claimant limits her claim for permanent partial general disability benefits to her whole person functional impairment rating.²

¹ R.H. Trans. at 15.

² *Id.* at 28.

In the April 18, 2006, Award, Judge Clark determined claimant injured her back at work and that she provided respondent with timely notice of that accidental injury. The Board agrees.

Claimant's testimony is credible that she promptly advised her hallway supervisor that she had injured her back. One of claimant's former supervisors, Linda Cales, vaguely remembers claimant as being a black female. But not unexpectedly, Ms. Cales does not recall what dates claimant may have worked under her. Ms. Cales also testified she did not fit claimant's description of the supervisor she notified on December 12, 2003, but there would have been at least two other nurses supervising the other hallways.³ In addition, respondent hired other nurses, called "bayer" nurses, to work the weekends and sometimes during the week.⁴

The Board affirms the Judge's finding that claimant has sustained a five percent whole person functional impairment due to the injuries she sustained working for respondent. Accordingly, claimant is entitled to receive benefits for a five percent permanent partial general disability under K.S.A. 44-510e.

The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Board affirms the April 18, 2006, Award entered by Judge Clark.

The record does not contain a fee agreement between claimant and her attorney. K.S.A. 44-536 requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the Judge for approval.

IT IS SO ORDERED.

³ Cales at 26, 27.

⁴ *Id.* at 34.

Dated this ____ day of August, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier